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No. 73-356

In the Supreme Court of the United States

OCTOBER TERM, 1973

RENATO RIVA, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner seeks, in this attack upon an order of deportation, to relitigate an issue already finally adjudicated against him in a prior exclusion proceeding—namely, whether he should have been admitted to the United States as a permanent resident alien despite his previous departure from this country in order to avoid the draft.

The facts are set forth in full in the decision of the Special Inquiry Officer, which is reprinted in the appendix to this memorandum (*infra*, pp. 5–12). In brief, petitioner, a citizen of Peru, was denied admission to the United States in an earlier proceeding on the ground that he "departed from * * * the United

States to avoid or evade training or service in the armed forces in * * * a period declared by the President to be a national emergency" (8 U.S.C. 1182(a)(22)). He was, however, given a temporary waiver of inadmissibilty under 8 U.S.C. 1182(d)(3) and was permitted to enter as a nonimmigrant for slightly more than one month so that he could complete his college education (Pet. App. C–2).

In his appeal from the decision of the Special Inquiry Officer in that proceeding, petitioner argued that, although he had left this country with the aim of avoiding military service, the statute should not be applied to exclude him, because the means by which he sought to accomplish that purpose involved only a temporary return to his native Peru in order to relinquish his permanent resident status in this country. That issue was resolved against him by the Board of Immigration Appeals and by the courts. See *Riva* v. *Mitchell*, 460 F. 2d 1121 (C.A. 3), certiorari denied *sub nom. Riva* v. *Kleindienst*, 411 U.S. 932.

Since petitioner overstayed his temporary admission, deportation proceedings were initiated.[1] At the hearing, petitioner sought to raise again the issue of his admissibility. He argued that he had not been informed of the consequences of relinquishing his permanent resident status, that the relinquishment was therefore not knowing and intentional, and that the

[1] Petitioner was charged under 8 U.S.C. 1251(a)(2), which provides that an alien may be deported if he "is in the United States in violation of this chapter or in violation of any other law of the United States * * *."

government should be estopped to deny that he was admissible as a permanent resident at the time of his last entry. The Special Inquiry Officer rejected the argument, finding that petitioner "has taken the position at all times most useful to his self interest and with no regard to the truthfulness of that testimony," and that petitioner's "prior written statements make his present claim no better than blatant lies" (App., *infra*, p. 9).

The Board of Immigration Appeals dismissed the appeal on the ground that the issue of petitioner's admissibility as a permanent resident had been previously adjudicated and was not properly presented in the deportation proceeding (Pet. App. C–3):

> The issue before us in this expulsion proceedings is simply whether or not the respondent has permission to remain in the United States. It is clear that he does not. He applied for admission with a visa good for a temporary admission only. He was authorized to remain for a temporary period only. The authorization has expired. It is clear that respondent is deportable as charged.

The court of appeals affirmed (Pet. App. B).

The decision of the court of appeals is correct, and further review is not warranted. Petitioner litigated and lost the issue whether he was properly excluded from this country. He cannot resurrect that question in a subsequent deportation proceeding merely by presenting it in a slightly different form. The Board of Immigration Appeals correctly resolved against peti-

tioner the only issue properly presented by him—whether he had permission to remain in the United States.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1973.

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[2] The court of appeals' judgment order of affirmance in this case recited that the court had reviewed petitioner's three substantive contentions and had found them to be without merit (Pet. App. B–2). Petitioner seems to draw from this the inference (Pet. 7) that the court did *not* similarly review and reject his further contention that the substantive issues were properly presented in the deportation proceeding. But there is no basis for that inference. The three contentions mentioned in the order are the three presented by petitioner's principal brief in the court of appeals. There is no reason to believe that the court rejected those arguments on the merits rather than on the basis stated by the Board of Immigration Appeals.

APPENDIX

United States Department of Justice Immigration and Naturalization Service

File: All 239 287—Newark, New Jersey, October 6, 1970

IN THE MATTER OF RENATO RIVA, RESPONDENT

In Deportation Proceedings

Charges: I & N Act—Section 241(a)(2) (8 U.S.C. 1251(a)(2))—Nonimmigrant—Remained Longer—Student.

Application: Voluntary Departure or Termination of Proceedings.

In Behalf of Respondent:
Elmer Fried, Esquire
515 Madison Avenue
New York, New York

In Behalf of Service:
Thomas W. Winnerman
Trial Attorney
Newark, New Jersey

DECISION OF THE SPECIAL INQUIRY OFFICER

The respondent is a 29-year old married, male alien, a native and citizen of Peru. He last arrived in the United States in May, 1968 and sought admission to the United States as a student to complete college work toward a degree. He was referred to a Special Inquiry Officer for a hearing to determine his admis-

sibility as it was believed he was inadmissible under Section 212(a)(22) of the Immigration and Nationality Act as an alien who had departed from the United States to avoid service in the armed forces. That hearing was protracted but eventually a decision was entered by a Special Inquiry Officer on January 7, 1969 which found him inadmissible under Section 212 (a)(22) but directed that he be admitted temporarily as a student to February 15, 1969 with the grant of a waiver of inadmissibility pursuant to Section 212(d) (3), (that decision was affirmed by the Board of Immigration Appeals).

The respondent completed his education but thereafter failed to depart from the United States, and the present deportation proceedings were instituted which charges that he was admitted as a student and thereafter remained longer than authorized. In essence, the respondent does not deny the facts in the order to show cause other than to maintain that he should be considered to be a lawful returning permanent resident at the time of his last entry and not a student. As such, he says he should not be required to depart from the United States at all. I find the respondent is deportable as charged, as the respondent was not a lawful permanent resident of the United States in 1968 or 1969.

In view of the fact that the respondent will in all likelihood litigate this decision and in view of the long and complex prior immigration hearings, it would appear appropriate that a complete review of the facts in this case be set forth in this decision. The respondent was born in Peru in 1941 and first came to the United States in 1956 when he was about 15 years of age for permanent residence. He, thereafter, made many entries to the United States in various nonimmigrant categories and has spent the greater portion

of the last 14 years in the United States. After his entry as a resident in 1956 he left, according to his testimony, in 1959, which would made him about 18 years of age a significant date in view of his subsequent attitude toward the selective service system. He re-entered the United States in 1959 as a student and remained here until 1961. His next known entry was in 1964 as a visitor. At that time he apparently became engaged and in that same year he and his fiance went to Peru, her only visit to that country. She soon returned to this country, and he came back once more in 1965 again as a tourist in order to marry. He was married on August 8, 1965.

He says that his wife was unable to leave the United States with him at that time and so he became desirous of working in the United States until she could depart with him in about June, 1966. He says that he inquired and discovered that as a tourist he could not lawfully accept employment so that for this *sole* purpose he made an application under Section 245 of the Immigration and Nationality Act on November 29, 1965 to become a permanent resident of the United States. He was then required to register under the selective service law and in July, 1966 received a notice of induction. As he was desirous of avoiding this, he made inquiry as to how it could be accomplished and believing that he could achieve this result by departing from the United States, abandoning his permanent residence and then re-entering as a nonimmigrant he proceeded to do just that. He asked for and was refused permission to leave the United States by the draft board, but nevertheless left the United States on August 7, 1966. On August 8, 1966 he wrote a letter to this Service from Peru returning his alien registration card and abandoning what he considered to be only a technical per-

manent resident status in the United States. He returned to the United States next on August 30, 1966 again as a tourist but actually to continue his studies. He entered in this status, because he had in his passport an unexpired visitor's visa which he could make use of without any formal application to the American Consul for a new or different visa. After his entry, he applied for further extension of his stay which was denied and he departed from the United States on February 11, 1967.

His next entry to the United States was a week later on February 18, 1967 at which time he was admitted with a new nonimmigrant visa he had obtained in that period of time as a representative of a foreign information media. The services he performed in this capacity were extremely limited and he was never paid for any of his efforts. There is a serious question that he ever genuinely was entitled to such a status. He was permitted to remain here until September 20, 1967 and after remaining longer than authorized deportation proceedings were instituted on November 14, 1967. He was granted permission to depart voluntarily from the United States in an order entered by me on November 11, 1967 which decision was affirmed by the Board of Immigration Appeals on March 4, 1968. He actually left the United States on May 25, 1968, and upon this trip to Peru, he sought a permanent visa and immigrant status for the third time. At this point of course he was safely past the age of 26, which he had reached on April 1, 1967. Not being immediately granted an immigrant visa, because the American Consul in Peru was seriously considering the question of his inadmissibility to the United States under Section 212(a)(22), he prevailed upon that Consul to furnish him with another student visa so that he could return and complete his student degree work. He came to the United

States with that student visa and this resulted in the excluding proceeding mentioned above and the ultimate entry as a student which is the subject of these deportation proceedings.

An analysis of the voluminous record before me and of the respondent's varying testimony now leads me to the conclusion that this respondent has taken the position at all times most useful to his self-interest and with no regard to the truthfulness of that testimony. Most of the variations concern matters peculiarly known only to the respondent such as his intentions as to residence and what kind of entry to the United States he was seeking. It is, therefore, not easy to determine the truth without a careful analysis of the entire record.

It is significant to note that present counsel for the respondent was his counsel in the first deportation hearing before me which commenced on December 11, 1967. He also appeared in the exclusion proceeding before Special Inquiry Officer Taffet in 1968 and before the Board of Immigration Appeals following both of those hearings. Despite this, not until this deportation hearing did the respondent or counsel ever claim that the respondent did not intend to abandon his lawful permanent residence in the United States as he clearly did by his letter of August 8, 1966.

This novel, legal and factual theory was presented to me first at the hearing of March 12, 1970. The legal theory being presented by counsel, the respondent immediately colored his testimony to conform but unfortunately for him his prior written statements make his present claim no better than blatant lies.

One of the Exhibits in this proceeding is a hand written letter from the respondent dated March 7, 1966 in which he said he had to return to Peru that June at the end of his wife's school year. He repeated

several times in that letter that he had no plans to stay in this country any later than June of 1966 and that he only applied for permanent residence as a technical choice rather than a genuine desire to be a permanent resident, solely because he wanted to work for a period of time between 1965 and 1966 when he remained here with his wife. Then upon his return to Peru in August 1966, he reiterates the fact that his intentions were never to become a United States citizen and that he only could have stayed in this country for a short period longer as he had to return to Peru where his future lay. In the course of the present hearing before me, there is found on Page 9, Page 13, and Page 17, wherein he reiterated that he didn't intend to stay in this country, and he had no plans to remain in this country. Yet in conformity, with the legal theory offered by counsel, he had the effrontery to testify under oath that his permanent resident status acquired in 1965 was so precious to him that if he had known his departure from the United States would bar his re-entry, he might have permitted himself to be drafted.

In essence, what the respondent is now attempting to do is claim that the permanent residence he acquired in 1965 against his will and better judgment was in fact a status so dear to him that only because of misinformation did he relinquish this position. I find his present testimony to be completely self-serving, without any foundation in fact and that the respondent abandoned his residence in 1966. He had no desire to have such a residence until he was past 26 years of age, at which time, at a hearing before me on December 11, 1967, he stated that he wanted to make the United States his home if he legally could.

Counsel has submitted a trial memorandum which I deem it appropriate to discuss. Point one says that he

believes the respondent should be regarded as having entered the United States on the occasion of his last admission with a visa as a lawful permanent resident. His argument is that when the respondent went to see the American Consul in Peru early in 1968 he did so with the intention of obtaining an immigrant visa and that it should be deemed that such a visa was issued because it should have been issued. I do not believe that if he had awaited the Consulate's final determination, he would have been issued a visa as that Consulate would undoubtedly have had to reach the same conclusion as has been reached by everyone else that the respondent was inadmissible under Section 212(a)(22).

In his second point, counsel says that the respondent should in the alternative be considered as a returning lawful permanent resident, but I believe this has been answered fully by my decision herein above.

As his third and last point, counsel refers to a decision dated September 19, 1956 made by the Regional Commissioner of the Northeast Region, and says that this decision should apply to the respondent. First, I am not in agreement with that decision, second it is not a decision of the Board of Immigration Appeals, and third the facts of that case are strikingly different from the instant one.

I, now turn to the question of the only relief available to the respondent, that of voluntary departure. He could depart from the United States at his own expense if he were disposed to do so, but I do not believe that the respondent will depart within a period of time I might set in this decision. He has already commenced an action in the U. S. District Court attacking the decision entered in his last exclusion proceeding and will undoubtedly appeal the finding in this case to the Board of Immigration Appeals and

perhaps to the courts again. A person who will depart from the United States only at his own leisure when he has exhausted what he believes to be all his legal remedies, rather than just his administrative rights, is not a person who is eligible for voluntary departure as one ready and willing to depart within the time offered. I, therefore, find him ineligible for voluntary departure.

Even if the respondent were eligible for voluntary departure, I would not be disposed to grant that relief to him as a matter of discretion, because he has, after numerous entries to the United States in various nonimmigrant capacities, violated his status. This is the second time it has been necessary to place him under deportation proceedings to enforce his departure. His last entry to the United States was gained by the exercise of extraordinary discretion in his behalf yet he has failed to comply with the terms of his admission. As he now realizes he is barred from entry to the United States for permanent residence. If he were granted voluntary departure he would undoubtedly seek entry again in the guise of a nonimmigrant. His application for discretionary relief should, therefore, be denied as a matter of discretion.

He declined to name a country of deportation, and I am required by the provisions of Section 243(a) to designate Peru. The provisions of Section 243(h) were considered, but no application has been filed by the respondent.

ORDER: *It is ordered,* That the respondent be deported from the United States to Peru on the charge contained in the order to show cause.

AARON I. MALTIN,
Special Inquiry Officer.

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